NO. 21141

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DECEVIGNE KILPATRICK,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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JURISDICTIONAL STATEMENT

The appellant, Decevigne Kilpatrick, was indicted on March 2, 1966, by the Federal Grand Jury for the Southern District of California, Central Division. 1/

This Indictment, which consisted of one count, charged appellant with transporting a 1966 Chevrolet Station Wagon in interstate commerce from Seattle, Washington to Fresno County, California, knowing that this motor vehicle had been stolen, in violation of Section 2312, Title 18, of the United States Code [C. T. 2].

The appellant was arraigned and entered a plea of not guilty

1/ C. T. refers to Clerk's Transcript of Proceedings.

as charged in the Indictment, on April 11, 1966.

A waiver of jury was filed, and trial was had before the Honorable Myron D. Crocker, United States District Judge, on May 31, 1966. Appellant's motion for judgment of acquittal was denied and he was found guilty [C. T. 14].

On June 13, 1966, appellant was sentenced to imprisonment for a period of three years, by the Honorable Myron D. Crocker, who included in the sentence his recommendation that the appellant be placed in an institution where he could receive psychiatric treatment [C. T. 15].

A timely notice of appeal was filed by appellant on June 17, 1966 [C. T. 18], and on June 29, 1966, appellant filed his statement of the point on which he intended to rely on appeal, namely, "That the Court erred in applying the MacNaughton irresistible impulse test of criminal responsibility and failed to apply the 'substantial capacity' test of the Model Penal Code" [C. T. 19].

The District Court had jurisdiction of the cause under Title 18, United States Code, Sections 3231 and 3237.

This Court has jurisdiction under Sections 1291 and 1294, Title 28, of the United States Code.

STATEMENT OF FACTS

On February 10, 1966, appellant Decevigne Kilpatrick was apprehended by members of the California Highway Patrol near Kingsburg, California, after leading them on an extended chase. 2/

2/ R. T. 62-66; R. T. refers to Reporter's Stenographic Transcript.

Appellant admitted that he had stolen the 1966 Chevrolet Station Wagon, in which he was apprehended, from a new car dealer in Seattle, Washington, and transported it across several state lines [R. T. 74].

The business manager of Nelson Chevrolet in Seattle, Washington, testified that the 1966 Chevrolet Station Wagon had been stolen from his company in the early part of 1966 [R. T. 70].

Solely at issue in the trial was the defendant's mental competency, and two psychiatrists were appointed to assist the court in this regard. The reports of Jackson C. Dillon, M. D., and Ilse Vivien Colett, M. D., were received in evidence [R. T. 6-7, 41], and are a part of the record on appeal [C. T. 3-13].

From the psychiatric testimony it developed that the appellant is an alert, well oriented, highly intelligent individual who communicates easily [R. T. 12]. His IQ is somewhere in the upper 15% of the American population [R. T. 16-17], and he was considered coherent, relevant, well-spoken and to have displayed no deficiency in memory for recent and past events [R. T. 34].

Both psychiatrists mentioned that while in prison, appellant had served as a psychiatric technician and had been assigned to deal with suicidal prisoners [R. T. 16, 30-31].

It was the opinion of Dr. Dillon that the appellant was "not suffering from any psychiatric illness; that is, a mental illness or nervous illness of any consequence or importance" [R. T. 12].

And the appellant "had been of sound mind in the past, too" [R. T. 12-13]. Furthermore, the appellant did not demonstrate any neurotic or psychoneurotic symptoms [R. T. 17].

Regarding the question of whether the appellant was suffering from a mental disease or defect, the following testimony was elicited from Dr. Dillon on cross-examination:

"Q. Now, you testified on direct examination, Doctor, that the defendant does not suffer from a mental disease; is that correct?

"A. Yes.

"Q. Would you say that he had a mental defect?

"A. Well, not a mental defect. The kind of defect I feel he has is in his personality." (R. T. 24].

Dr. Colett's opinion differed from Dr. Dillon's in that she felt appellant's illness was a mental defect [R. T. 43-44]. However, Dr. Colett further stated that in her interpretation most sociopaths have a mental defect [R. T. 49].

Dr. Colett gave her diagnosis in the following manner:

"A. I felt that Mr. Kilpatrick had a sociopathic personality disturbance. He shows an antisocial reaction with severe neurotic compulsive tendencies.

"Q. Can this man therefore be considered insane in the true concept of mental illness?

"A. In the true concept of mental illness,

no." [R. T. 38].

Dr. Dillon testified as to his diagnosis:

"A. Well, my diagnosis was that of a personality disorder, sociopathic type. By that I mean that he has a personality difficulty which would lead to abnormal or antisocial behavior.

"Q. Would such diagnosis militate against his criminal responsibilities?

"A. No, I think most criminals would fall in this category.

"Q. Is it your opinion that the defendant has a compulsion to steal cars, Doctor?

"A. Well, he is certainly a recidivist. He has stolen cars anytime the opportunity arose, certainly, when he is released from custody. I'm not so sure that he has a compulsion to steal them in the sense of a psychoneurotic compulsion. I think that this is a recidivist behavior pattern.

"Q. Is it your testimony that this is or is not the product of an organic brain disfunction?

"A. I don't believe its the result of organic brain disfunction; no.

"Q. Is it the result of any recognized mental illness?

"A. No, I don't think so." [R. T. 18].

Both psychiatrists testified that the appellant is not able to tolerate release from incarceration, and that if he is released again without psychiatric intervention he will likely commit further crimes in an effort to return to the prison environment [R. T. 20-22, 38-40]. The anxiety which appellant experiences upon his release is not a neurotic anxiety, but rather a nervousness commensurate to all the circumstances of his situation [R. T. 28].

It was Dr. Dillon's opinion that appellant is "a typical example of a recidivist sympton, who, as soon as he is released from prison, would promptly carry out that same type or almost exactly the same pattern of activity that he previously demonstrated" [R. T. 22].

ARGUMENT

I

THIS CASE PRESENTS NO REASON TO CHANGE THE TRADITIONAL TEST OF INSANITY IN THE NINTH CIRCUIT.

The M'Naghten - "irresistible impulse" test is the firm-standing test of criminal insanity in this jurisdiction, despite attempts on the part of some litigants to replace it with the Durham rule or the American Law Institute's formula. Sauer v. United States, 241 F. 2d 640 (9 Cir.), cert. den. 354 U. S. 940, 77 S. Ct. 1405 (1957); Smith v. United States, 342 F. 2d 725 (9 Cir. 1965). M'Naghten - "irresistible impulse" is the measure which is employed in the majority of American jurisdictions. Anderson v.

United States, 237 F. 2d 118 (9 Cir. 1956). The Court, in Sauer, supra, stated that "it is not for this court to undertake a drastic revision in the concept of criminal responsibility, a task which would necessitate a searching analysis of philosophies, purposes and policies of the criminal law, and which might substitute freedom of insane persons for either confinement or commitment. If change there is to be, it must come from a higher judicial authority, or from the Congress."

Whether the court meant by that language that it considered itself unable to change the law or, rather, unwilling to change the law, the court was certainly indicating caution and restraint from acting in any situation where the alternative proposed and the urges of justice did not compel so drastic a revision of the law.

That the American Law Institute's test of insanity does not offer so compelling an alternative, especially in light of the existing lack of automatic commitment provisions in most federal courts, is reflected by the fact that the Ninth Circuit has recently considered and rejected this definition. Smith v. United States, 342 F. 2d 725 (9 Cir. 1965).

II

THERE IS NOTHING IN THE RECORD TO INDICATE THAT THE TRIER OF FACT DID NOT APPLY THE AMERICAN LAW INSTITUTE'S TEST OF INSANITY, AS WELL AS THE M'NAGHTEN - "IRRESISTIBLE IMPULSE" TEST.

In his closing statement before the trial court, defense counsel argued that the defendant was insane under the American Law Institute's definition of insanity, as well as under the traditional Ninth Circuit definition of insanity [R. T. 77-81].

In rendering his decision, Judge Crocker had the following discussion with counsel for the defense:

> "THE COURT: Yet, both (psychiatrist) claim that he is sane.
>
> "MR. JONES: In the McNaughton sense, you mean.

"THE COURT: In the McNaughton sense or any other sense." [R. T. 86].

From this discussion it would appear that the trier of fact, in reaching its opinion as to the sanity of appellant, found the defendant to be sane under the traditional M'Naghten - "irresistible impulse" test, and under the ALI Mental Disease-Defect-Substantial Capacity Test, especially since there is nothing in the record to indicate that the court did not apply the ALI test which counsel for the defendant, in his final argument, defined and requested [R. T. 77-81].

III

THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE FINDING THAT APPELLANT'S CONDUCT WAS NOT THE RESULT OF A MENTAL DISEASE OR DEFECT.

The Model Penal Code of the American Law Institute, Section 4.01(1), provides:

"A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law." [emphasis added].

The application of this test seeks a "mental disease or defect". The testimony of the psychiatrists in the court below was in conflict as to whether appellant was suffering from a mental disease or defect.

Dr. Dillon stated, unequivocally, that appellant was not suffering from a mental disease or defect [R. T. 24].

Dr. Colett was of the opinion, however, that appellant's illness was a mental disease. Yet, Dr. Colett's diagnosis, like Dr. Dillon's, was that appellant had a sociopathic personality [R. T. 18, 38], and, as Dr. Dillon testified, most criminals fall within this diagnosis [R. T. 18]. Dr. Colett even went on to say that, in her opinion, most sociopaths have a mental defect [R. T. 49]. It is submitted, therefore, that what Dr. Colett meant by "mental defect" could not have been what the writers of the American Law Institute test meant by mental defect, otherwise almost every criminal before the courts would be classified insane.

The verdict of the trial judge as the sole trier of fact in this case must be sustained, since there is substantial evidence, taking the view most favorable to the Government, that appellant's failure to conform his conduct to the requirements of law was not the result of a mental disease or defect. Fraker v. United States, 294 F. 2d 859, 861 (9 Cir. 1961).

CONCLUSION

The position of the Government is that Judge Crocker did apply the ALI test, after defense counsel defined and argued for it. Judge Crocker, with the ALI test, and the traditional Ninth Circuit standard in mind, found that the evidence, in his opinion, did not support a finding of not guilty by reason of insanity "under any test". Since there is substantial basis in the evidence for Judge Crocker's decision, the judgment below should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ William J. Gargaro, Jr.

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